

OCT 21 2002

Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, *et al.*

Plaintiffs,

v.

ENRON CORP., an Oregon corporation,
et al.,

Defendants.

CIVIL ACTION NO. H 01-3624 ✓
AND CONSOLIDATED CASES

PAMELA M. TITTLE, on behalf of herself
and a class of persons similarly situated, *et al.*,

Plaintiffs,

v.

ENRON CORP., an Oregon corporation,
et al.,

Defendants.

CIVIL ACTION NO. H 01-3913
AND CONSOLIDATED CASES

DEFENDANT KEN L. HARRISON'S RESPONSE TO THE BANKS' JOINDER IN
PLAINTIFFS' JOINT MOTION TO ENTER ORDER ESTABLISHING
DOCUMENT DEPOSITORY

The questions to be answered in this case are who knew what, who did what, and who is responsible for what. How documents are produced may be the single most important factor in enabling the parties to answer these questions. In their opposition to the order proposed

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by Mr. Harrison, neither the Banks¹ nor the Plaintiffs² make a showing that requiring documents to be grouped by the files in which they were found (the effect of the source identification field) would not be of critical importance. Instead, the Banks seek to prevent this information from being captured by arguing that it should not be done because they did not agree to do it voluntarily. The Plaintiffs argue that since the Banks and others have already started coding, requiring something additional to what they were willing to do voluntarily will slow discovery. They also argue that the information can be obtained by the use of interrogatories—something the Banks say they will oppose.

Given current estimates, if the documents to be produced in this case were placed in a vertical stack, that pile of paper would be more than eight times taller than the Sears Tower in Chicago. Sorting these documents by any means other than source (*e.g.*, by listed recipients, or by a particular word in the description) would necessarily, and completely, scramble them. By contrast, if the source of each document is coded, the litigants can create an index of the departments and individuals who produced documents and which files each person had in their possession. This capability would prove vital, for example, to sorting through the maze of 100,000 people who work for JP Morgan Chase & Co. in offices in over 50 countries. The source field will also allow us to determine with certainty the Bates range of documents that constitute a complete file on any subject for any witness. This will expedite determining who should be deposed, as well as avoid delay and confusion at depositions regarding whether an exhibit with a certain Bates range constitutes the witness' complete file.³

¹ See Banks' Joinder in Plaintiffs' Joint Motion to Enter Order Establish Document Depository (hereinafter "Banks' Joinder").

² See Plaintiffs' Joint Response to Defendant Ken L. Harrison's Objections to Plaintiffs' Joint Motion to Enter Order Establishing Document Depository (hereinafter "Plaintiffs' Joint Response").

³ As opposed to encountering a witness who has not reviewed his or her files before the deposition and therefore simply cannot authenticate the proffered exhibit.

Requiring the source field will not impede discovery, but in fact facilitate the just, speedy, and efficient resolution of this mammoth case by providing the parties with the tools necessary to identify relevant documents efficiently and effectively. *See* Fed. R. Civ. P. 1 (stating that the FRCP are to be construed and administered so as to "secure the just, speedy, and inexpensive determination of every action.").⁴ The Banks cite the fact that the relevant information is not apparent on the face of the documents as a major argument against requiring the field. (Banks' Joinder at 4.) However, it is precisely because Mr. Harrison will not be able to identify this information from the face of the document that he needs it. This is not a matter of shifting the burden to the producing party—the producing party is the only one who can supply the information. The fact that some parties have already begun coding documents on the assumption that they will not be required to provide it (Banks' Joinder at 4) should not be used to justify an inadequate production scheme.⁵

Plaintiffs' suggested alternative means to identify the relevant source information are not adequate for the task. (Plaintiffs' Joint Response at 2.) For example, as explained in the Objection, searching for "Lay" in the proposed index will presumably identify documents that state on their face they were sent to or received by Ken Lay, and perhaps some documents

⁴ This is the ultimate point underlying the cases cited in Mr. Harrison's Objections to Plaintiffs' Joint Motion to Enter Order Establishing Document Depository ("Objection"), not that those cases specifically mandate use of a "folder" field in this litigation.

⁵ Although it is not relevant to the merits of Mr. Harrison's objection, it seems necessary to respond to the suggestion that Mr. Harrison has raised this objection at the eleventh hour out of some inexplicable desire to thwart the discovery process. That is simply not the case. Mr. Harrison cannot respond to the Banks' assertion that it never heard of this issue until September 4 (Banks' Joinder at 5), since his counsel was not privy to the negotiations between the representative for the insured defendants' counsel and counsel for the Banks and the plaintiffs. However, Mr. Harrison's counsel did repeatedly communicate his concern regarding source identification to counsel for the other insured defendants throughout the negotiations. That is the group to which his counsel belonged and, as previously represented, that group was well aware of this concern. The concern is no less valid or worthy of consideration by this Court because other counsel either did not take it "seriously" (Plaintiffs' Joint Response at 1) or decided "after careful consideration by all parties" that the field should be optional (Declaration of Jerrilyn Hardaway in Support of Plaintiffs' Joint Response to Defendant Ken L. Harrison's Objections to Plaintiffs' Joint Motion to Enter Order Establishing Document Depository, at 2).

referencing Ken Lay, but it will not identify files that were in Ken Lay's possession. Similarly, copying file folder labels is important (especially if documents are to be produced as kept in the "usual course of business" under FRCP 34), but file folder labels often do not identify source. Interrogatories are also insufficient because (1) posing an interrogatory based on the producing party's organizational structure requires specific knowledge of that organizational system which Mr. Harrison simply does not have (*i.e.*, it is impossible to ask for the files of a department that one does not know exists); and (2) FRCP 33 provides for only 25 interrogatories in any event, which would never be sufficient to identify the files of relevant individuals and departments at Enron, for example. It is also noteworthy that the Banks indicate they would object to exactly the type of interrogatory Plaintiffs propose. (Banks' Joinder at fn. 4.)

At the same time, Plaintiffs' suggestion that their objection is not to providing source data, but rather to integrating such data into the objective coding process, is interesting and may provide the basis for a compromise. (Plaintiffs' Joint Response at 3.) Plaintiffs appear to assert that the parties would be willing, and that it would be much less expensive and burdensome, to supply source data in a more summary format, *i.e.*, providing the Bates ranges of files belonging to each individual and department. (*Id.*) It is difficult to understand why incorporating this information into the index would be substantially more burdensome than providing it in a list. However, if the parties are willing to produce source information in a list format (without requiring specific interrogatories before doing so), then production of such a list, in conjunction with mandatory copying and indexing of file folder labels, would be sufficient to address Mr. Harrison's concerns. Mr. Harrison is interested only in the substantive information, not the format in which it arrives, and has no desire to impose any unnecessary burden on the other producing parties.⁶

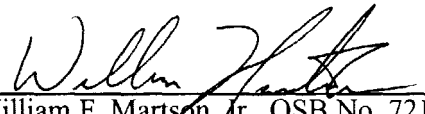
⁶ At the same time, Mr. Harrison has as much right and interest as anyone to ensure that a workable framework is created for the document depository so that he may effectively review documents and prove his defense. While other parties may consider Mr. Harrison "one minor player" (Plaintiffs' Joint Response at 5), the fact is that Mr. Harrison is a defendant in one of the

For the foregoing reasons and the reasons stated in the Objection, Mr. Harrison asks this Court for the relief requested in paragraph 1 of the Objection. In the alternative, if the Court believes that it would be less burdensome and more acceptable to the parties to order (1) mandatory copying of file folder labels, and (2) mandatory provision of a list of sources of documents identified by Bates number range (without requiring specific interrogatories), then Mr. Harrison does not object to this alternative method of identifying source.

DATED: October 21, 2002

Respectfully submitted,

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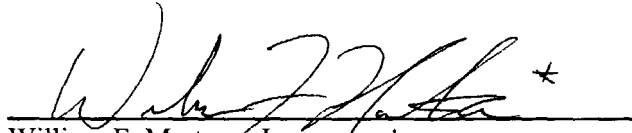
largest securities fraud actions of all time and is being sued for every penny he has. The fact that there are many other parties does not diminish the importance of this litigation to him.

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CERTIFICATE OF SERVICE

I certify that on the 21st day of October 2002, a true and correct copy of DEF. HARRISON'S RESPONSE TO THE BANKS' JOINDER IN PLAINTIFFS' JOINT MOTION TO ENTER ORDER ESTABLISHING DOCUMENT DEPOSITORY was served by posting the same to the website pursuant to the Order entered by United States District Judge Melinda Harmon, Southern District of Texas, Houston Division, in Civil Action Nos. H-01-3624 (Consolidated Cases) and H-01-3913 (Consolidated Cases) (Instrument No. 819), and mailed to those parties consolidated into these matters after August 19, 2002.


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